NOTES

Defective Formation and Suits in the Corporate Name

Failure to comply with an applicable statute relative to the formation of a corporation may result in a wide departure from the legal consequences of perfect compliance. The association may or may not be able to sue in its "corporate" name; it may or may not be subject to suit in its "corporate" name; the members of the association may [1] or may not [2] be liable as partners; the association may be taxable as an association or as a partnership; [3] land conveyed by the association in its "corporate" name may or may not confer on the grantee a good title to the land; [4] the association may [5] or may not [6] be able to condemn land for a right of way; the association may [7] or may not [8] be able to recover on share subscriptions; an officer who has appropriated the association's money may or may not be guilty of embezzlement from a corporation; [9] there may or may not be a right of removal to the federal courts.[10]

The traditional theory in regard to these problems is that if the association has complied with the incorporation laws to such an extent as to create a "de facto" corporation, all the legal attributes of a corporation result, except that the corporate existence may be terminated by a quo warranto proceeding brought by the state.[11] But if the compliance falls short of this "de facto" standard, the association has attributes similar to those of a partnership. Although some writers limit the doctrine by classifying certain of the above situations as exceptions to the rule,[12] generally the thought is that an association is or is not a "de facto" corporation. No distinctions are made as to the purposes for which the determination of the association's nature is desired.

The reported cases, however, do not lend themselves to any such simple analysis and it is quite possible that the legal attributes of a corporation may obtain in some of the above circumstances, and those of a partnership in others, even though the defects in organization be the same.

The principal reason for requiring those seeking to form a corporation to take all the steps which are now specified by incorporation statutes is to

1. Guckert v. Hacke, 159 Pa. 303, 28 Atl. 249 (1893).
2. Diamond Rubber Co. v. Fohey, 111 Miss. 654, 71 So. 906 (1916); Note (1892) 17 L. R. A. 549.
3. Rockwood v. United States, 38 F. (2d) 707 (Ct. Cl. 1930).
4. Society Perun v. City of Cleveland, 43 Ohio St. 481, 3 N. E. 357 (1885).
5. Brown v. Wyandotte & Southeastern R. R., 68 Ark. 134, 56 S. W. 862 (1900).
6. Kinston & Carolina R. R. v. Stroud, 132 N. C. 413, 43 S. E. 913 (1903); Note (1926) 44 A. L. R. 542.
7. Raegener v. Hubbard, 167 N. Y. 301, 60 N. E. 633 (1901).
8. Allman v. Havana, Rantoul & Eastern R. R., 88 Ill. 521 (1878).
9. People v. Carter, 122 Mich. 668, 81 N. W. 924 (1900).
10. Erskine Motors Co. v. Chevrolet Motor Co., 180 N. C. 619, 105 S. E. 420 (1920).
11. Warren, *Collateral Attack on Incorporation—A. De Facto Corporations* (1907) 20 HARV. L. REV. 456, 457n.; FREY, CASES AND STATUTES ON BUSINESS ASSOCIATIONS (1935) 62.
12. Carpenter states that suits on share subscriptions and suits to condemn land are exceptions to the de facto doctrine. Carpenter, *De Facto Corporations* (1912) 25 HARV. L. REV. 623.

protect those who might deal with or have a claim against the corporation. There may be additional motives (*e. g.*, securing to the state of information for use in the collection of taxes and fees) behind such requirements as filing the articles or a copy thereof with the secretary of state, but protection of creditors is the primary goal. If a mere agreement among individuals could create a corporation, a door to fraud would be open. The members could hide behind the cloak of limited liability, while the person dealing with the association, or asserting a claim against it, would have no source of information concerning its structure, activities and financial condition. One means of inducing compliance with the statutory provisions relative to incorporating is, in the event of non-compliance, to deny the association the privileges of a corporation, particularly in case of serious defects. If failure to treat the association as a corporation would, in a given instance, penalize an innocent party and not the defective association, this unfortunate result should be avoided wherever other considerations of greater importance are not involved.[13] On the other hand, if the person who will be benefited by denying corporate consequences is one of a class whom the statute was designed to protect, a refusal to recognize the existence of a corporate attribute would seem desirable. But in the latter situations there is a "fairness" factor which courts take into account. This is especially true in cases where an attempt is made to hold members of the association liable as partners for a debt of the association. Here the person to be benefited by refusing to allow corporate consequences is one of the class which the statutes relative to incorporating aim to protect. The imposition of individual liability on the members is a strong inducement for compliance by the associates. But unless the defect in organization is a serious one, the policy of "fairness" forbids holding members liable as partners when they have not contracted for such liability and when some of them are not personally to blame for the defect. The deciding factors in these cases are whether the defect is serious and whether the dealings have been on a corporate basis.[14]

The purpose of this general discussion is merely to point out that the factors which influence the courts in determining whether or not to allow a corporate consequence in a specific instance will vary greatly according to the nature of the problem. Some of the courts have apparently recog-

13. For example, a person purchasing land from a defectively organized corporation, the deed terming the grantor a corporation, might have his title controverted by some third person. In such a case the fair result would seem to be to recognize as valid the title obtained from the "corporation", particularly if the original grantee has conveyed to an innocent purchaser, whose title is then contested. None of the statutory provisions are for the benefit of a third person who has never dealt with or had a claim against the association, and the policy of inducing compliance by refusing corporate consequences would have no application here because the loss would not fall on the association or the members thereof. Courts in such a situation have in fact held the grantee's title valid. City of Denver v. Mullen, 7 Colo. 345, 3 Pac. 693 (1884); Society Perun v. City of Cleveland, 43 Ohio St. 481, 3 N. E. 357 (1885); see Warren, *Collateral Attack on Incorporation—A. De Facto Corporations* (1907) 20 HARV. L. REV. 456, 457n.

14. Inter-Ocean Newspaper Co. v. Robertson, 296 Ill. 92, 129 N. E. 523 (1920); Diamond Rubber Co. v. Fohey, 111 Miss. 654, 71 So. 906 (1916); Guckert v. Hacke, 159 Pa. 303, 28 Atl. 249 (1893). A compilation of the cases in this field indicates that the most important factor is whether dealings were on a corporate basis. Where the dealings were on a corporate basis the ratio is practically 2 to 1 in favor of non-liability. Where the dealings were not on a corporate basis the ratio is 10 to 1 in favor of holding the members liable. FREY, CASES AND STATUTES ON BUSINESS ASSOCIATIONS (1935) 64.

nized this fact in reconciling their own decisions.[15] The comparative maze surrounding the field of "de facto" corporations will be relatively clarified if the problems are recognized as separate, and the answers to each not necessarily to be found in the answer to a general query as to the existence or non-existence of a "de facto" corporate body.

The present investigation is confined to the ability of a defectively formed "corporation" to sue in its "corporate" name, and the liability of the association to a suit against it in its "corporate" name.

Effect of "Dealings on a Corporate Basis"

Before investigating the consequences which have attended each type of defect, it may be well to discuss a factor which runs through the cases and which is regarded by the courts as legally important, namely, whether the dealings between the association and the other party were on a corporate basis or otherwise.

The legal effect of dealings on a corporate basis is by no means clear as regards the use of the corporate label in lawsuits involving the association.[16] Impressed with the importance of this factor, some courts allow the association to sue in the corporate name if the dealings were on a corporate basis, with no mention of any defects that may exist.[17] If serious defects are present, however, many courts deny the association the use of the corporate name, though it had been used in dealings with the other party.[18] By far the most confusion in this connection has arisen from the use of the term "estoppel", and this deserves particular attention.

It is often said that because the party dealing with the association failed to object to the use of a name apparently describing a corporation, he is estopped to deny that it is a corporation.[19] This is obviously far afield from a true estoppel, which operates only when the person to be estopped has made a false representation, under circumstances likely to induce a third person to act to his detriment, and the third person has so acted. In the situation under discussion, there is in fact no representation by the party dealing with the association. If any representation is made, it is made by the association. And even if some representation by the other party can be discovered, it is ordinarily impossible to establish any reliance thereon by the association to its injury.

If the facts are not such as to warrant the application of a true estoppel, why do the courts invoke this doctrine and so stretch it when dealings are

15. See Schmitt v. Potter Title & Trust Co., 61 Pa. Super. 301, 308 (1915); Henry v. Centralia & Chester R. R., 121 Ill. 264, 267, 12 N. E. 744, 745 (1887).

16. In one case the presence of dealings on a corporate basis appeared to influence the court in deciding whether or not there was a *de facto* corporation. Gilman v. Druse, 111 Wis. 400, 87 N. W. 557 (1901). In two cases the courts seemed to feel that both a *de facto* corporation and dealings on a corporate basis were needed in order to allow corporate consequences. Washington Investment Ass'n v. Slantey, 38 Ore. 319, 63 Pac. 489 (1901); Black River Improvement Co. v. Holway, 85 Wis. 344, 55 N. W. 418 (1893); see Note (1920) 5 MARQ. L. REV. 46, 47.

17. Societe Titanor v. Paxton & Vierling, 124 Neb. 570, 247 N. W. 356 (1933); Montoya v. Hubbell, 28 N. Mex. 250, 210 Pac. 227 (1922); Note (1920) 5 MARQ. L. REV. 46, 47.

18. Aspen Water & Light Co. v. City of Aspen, 5 Colo. App. 12, 37 Pac. 728 (1894); Imperial Building Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 N. E. 167 (1908); Eastern Products Corps. v. Tennessee Coal, Iron & R. R., 151 Tenn. 239, 269 S. W. 4 (1924).

19. See Estey Manufacturing Co. v. Runnels, 55 Mich. 130, 133, 20 N. W. 823, 825 (1884); Hagerman v. Ohio Building & Savings Ass'n, 25 Ohio St. 186, 201 (1874).

on a corporate basis? A plausible explanation of this result may be hazarded. When the other party is suing the members of the association individually, as if partners, it is natural that courts rebel at allowing recovery where the dealings were on a corporate basis. The plaintiff understood, in his dealings with the association, that it purported to be a corporation, and an understandable reaction is that he should have recourse only to the association assets for payment of the obligation. To allow him a right of action against the individual members is to grant him a windfall at the expense of persons who did not contract for such liability. The above reasoning may be sufficient justification for withholding relief in such cases, without ascribing the plaintiff's frustration to "estoppel." But the term is used, and the courts seem to regard these cases as setting up a doctrine that when the dealings are on a corporate basis, the other party is estopped to deny the corporate nature of the association. Accordingly, when confronted with cases in which the association is suing the other party, many courts adopt the procedure of "estopping" the defendant from denying the association's privilege of suing in the corporate name, if he had dealt with what purported to be a corporation.

Setting aside for the moment the question of whether the cases warrant the use of "estoppel" language, it may be agreed that it is often reasonable to disregard objections to suit in the corporate name. The association, if denied the use of its corporate name, generally still has its right of action which may be enforced in the names of its members.[20] The result of such a denial is actually a postponement of a hearing on the merits. But it is still difficult to appreciate the necessity of reaching the result by the device of an inapplicable concept, and it would seem to be better for the courts to discontinue use of the term "estoppel" in such cases.

The impropriety of using the term "estoppel" is further emphasized by a recent tendency to extend the scope of the concept of dealing on a corporate basis. The original meaning attached to the expression was that the claim arose out of a contract in which the association was named as a corporation, and in such a case it could truly be said that the other party had voluntarily dealt with a purported corporation. In one case, the plaintiff purchased a ticket for a ride, from a traction company, and this was considered a "dealing on a corporate basis" in connection with a resulting claim in tort for the negligence of the company's employees.[21] In another case, the recognition of the association as a corporation came only after the execution of the contract on which suit was brought.[22] Filing a counterclaim against the association had also been held to "estop" the defendant from contesting the plaintiff's corporate existence.[23] In the case of *Burke v. Barnum & Bailey*,[24] a spectator was injured by negligence of the de-

20. It is conceivable that the defendant could successfully contend that he had been willing to deal only with a corporate body, and could not be forced to defend a suit brought by individuals. In such a case denial of the privilege of suing in the corporate name would of course have serious effects. This contention has not been encountered in the cases, however, and has apparently had no bearing on the results.

21. Pinkerton v. Pennsylvania Traction Co., 193 Pa. 229, 44 Atl. 284 (1899).

22. Societe Titanor v. Paxton & Vierling Iron Works, 124 Neb. 570, 247 N. W. 356 (1933).

23. Bell v. Commercial Investment Trust Co., 118 Okla. 230, 246 Pac. 1102 (1926).

24. 40 R. I. 71, 99 Atl. 1027 (1917). This is an action against the association, as distinguished from actions by the association, which we have so far been considering. It is included at this point to show the extremes to which the concept of estoppel has been stretched.

fendant association, and a writ of foreign attachment was served on the defendant's property. The association executed a bond to the sheriff for the release of its property, naming itself in the bond as a corporation. The court held that this "estopped" the defendant from showing that it was in fact a partnership. These cases, it seems clear, have wandered far from the original theory that contractual dealings on a corporate basis would preclude a party from later denying the corporate existence. In none of the cases does "estoppel" seem to be a particularly helpful concept in reaching an equitable result. There appears to be considerable confusion in the reasoning of the courts, and nowhere is it so clearly shown as in the case of *Munter v. Ideal Peerless Laundry.*[25] The association had taken out workmen's compensation insurance in its corporate name from the defendant. No effort at all was made to incorporate. One of the association members was injured and brought suit against the defendant insurance company, basing his claim on an injury incurred while working for the "corporation" named in the contract. The court stated that the defendant was "estopped" from attacking the association's corporate existence because it had dealt with it on a corporate basis, but that it was not "estopped" from denying that the plaintiff worked for a corporation. The holding was that the plaintiff accordingly could not recover, but an attempt to follow the court's reasoning is decidedly not profitable.[26]

Insofar as the factor of "dealings on a corporate basis" tempts the courts to resort to the device of estoppel, the effect in these cases is to confuse the issues, and at best to clothe desirable results in unclear language. Aside from this, as will be seen later, there is little apparent relation between the existence of this factor and the case holdings.[27] However, in one type of defect, namely organization with no valid statutory authority, dealings on a corporate basis seem to be the deciding factor. As seen before, an increasing number of cases, without mentioning any defects at all, allow the association to sue if the dealings were on a corporate basis. Some of these cases may have involved defects which would have been serious enough to deny suit in the corporate name, had dealings not been on a corporate basis. Although this must be a matter of speculation as far as the reports are concerned, there is a distinct possibility that the results have been influenced in this fashion by the factor of dealings on a corporate basis. And finally, generalizations are made dangerous by the fact that in the great majority of cases the dealings are on a corporate basis, thus making it difficult to predict the result if that factor is not present.

Ability to Sue in the Corporate Name in General

The usual dogma as to the requisites of a de facto corporation is that (1) the associates must have made an attempt to incorporate, resulting in a "colorable" organization; (2) the attempt to incorporate must have been

25. 229 App. Div. 56, 241 N. Y. Supp. 411 (3d Dep't 1930).

26. The court indicates that a member of a partnership cannot recover on workmen's compensation insurance taken out by his firm. The desire to reach this result while paying respect to language in previous cases involving dealings on a corporate basis probably caused this twisting. *Id.* at 58, 241 N. Y. Supp. at 414.

27. This is in sharp contrast to the effect of dealings on a corporate basis where the suit is against the members to hold them individually liable for the debts of the association. See note 14, *supra.*

made in good faith; (3) there must have been a law authorizing the formation of such a corporation as was attempted; (4) there must have been a user of some of the powers which such a corporation would possess.[28] This list of requisites furnishes a good framework for an inspection of the cases concerning what is required for an association to sue in its corporate name.

Before analyzing the court holdings in detail, however, it seems advisable to consider certain general policies which have influenced the results. The effect of failure to allow suit in the corporate name is generally merely to require that another suit be started, this time in the name of the members as individuals. This is a waste of considerable time for the association, the defendant and the court, without any compensating advantages for anyone concerned, unless one of the parties wishes to postpone a trial on the merits. Such a desire is not likely to receive sympathetic treatment from the courts, and need not be given serious consideration. If the association has a valid claim against a person, it should make no difference whether the group to which he is forced to pay is suing in a corporate name or as if a partnership. In either event he has to pay the debt and will only have to pay it once.

The language in which the statutes specify the acts to be done in the organization of a corporation is generally of no importance in deciding whether the association may bring suit in its corporate name. At one time considerable importance was attached to this factor and the courts considered whether certain language created a condition precedent to corporate existence [29] or was merely directory.[30] This was based on the theory that if there was no corporation at all in existence, the association could not sue in the corporate name. However, the desire of the courts to allow the association to sue in its "corporate" name in spite of a failure to do some act specified by the legislature, led to some results which the above dogma does not satisfactorily explain. Statutes, for example, might provide "as soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have the power to commence business", or "no corporation shall be organized, until . . . (it) . . . shall pay . . . $100", and the courts regarded these provisions as not creating conditions precedent.[31] Decisions of this sort emphasized the invalidity of such distinctions as were based on the legislative intent as to when the corporation should come into existence. This confusion pointed to the real problem—not whether the association constitutes a corporation, but whether the association has sufficiently complied with the statute to allow it to sue in the corporate name.

There is legislation in many states eliminating the problem.[32] Several states have statutes to the effect that the organization of a corporation

28. See Warren, *Collateral Attack on Incorporation—A. De Facto Corporations* (1907) 20 HARV. L. REV. 456, 464; Dinerstein, *De Facto Corporations in Wisconsin* (1919) 3 MARQ. L. REV. 137; Goode, *A Study of Missouri Cases and Some Others Which Treat of De Facto Corporations* (1919) 3 ST. LOUIS L. REV. 175.

29. Boise City Canal Co. v. Pinkham, 1 Idaho 790 (1880); Lord & Robinson v. Essex Building Ass'n, 37 Md. 320 (1872); Boston Acid Manufacturing Co. v. Moring, 81 Mass. 211 (1860).

30. Braintree Water Supply Co. v. Braintree, 146 Mass. 482, 16 N. E. 420 (1888).

31. Wells Co. v. Gastonia Cotton Manufacturing Co., 198 U. S. 177, 183 (1905); Hughesdale Manufacturing Co. v. Vanner, 12 R. I. 491, 492 (1880).

32. Some statutes raise a difficult question of interpretation. One of the best known cases in this field, Jones v. Aspen Hardware Co., 21 Colo. 263, 40 Pac. 457 (1896), arose un-

cannot be collaterally attacked.[33] Others provide that a corporation cannot bring suit unless it has, for example, paid certain fees.[34] Cases controlled by statute are not included in this study due to the excessive space which would be required for their adequate treatment.

The following analysis of the cases has been based on the previously mentioned requisites for the existence of a "de facto" corporation. Three general classifications have also been made, (1) where the dealings were not on a corporate basis, (2) where the dealings were on a corporate basis, (3) where the defendant is an ex-official or an incorporator of the plaintiff association. The reason for this third classification is that the courts appear very reluctant to allow the defendant to profit by a defect which he was responsible for or should have corrected.

(Unless otherwise indicated, the association was allowed to sue)

	Dealings not on a corporate basis	Dealings on a corporate basis	Defendant an official (dealings also on a corporate basis)
Defect not stated	0	12	4
1. Attempt to incorporate resulting in "colorable" compliance			
a. No acceptance of charter	0	0	1
b. Failure to pay fee	0	1	0
c. Failure to file certificate with state	0	2	0
d. Failure to file bond with state	1	1	0
e. Defects in the certificate itself	2	2	0
f. Defects in the execution of certificate	1	4	0
g. Failure to file certificate with county	3	0	2
h. Defects in certificate filed with county	1	1	0
i. Failure to file other papers with county	0	2	0
j. Failure of state authorities to do acts	1	2	0
k. Failure of special classes of corporations to measure up to requirements	0	6	0
l. Insufficient number of shares subscribed	0	2 allow suit 1 cannot sue	0
m. No stock issued	0	0	1
n. Failure to pay in capital	0	4	0
o Insufficient number of incorporators	0	2	0
2. Good faith			
a. False statement in application to the state	0	4	0
b. Collusion for repayment of subscriptions	0	1	0
3. No valid statute authorizing such a corporation			
a. No statute to cover stated purpose	2 cannot sue	0	0
b. Illegal purpose	0	3 allow suit 1 cannot sue	0
c. Statute unconstitutional	2 cannot sue	5	0
4. User			
a. No user at all	0	1 cannot sue	1 cannot sue
b. No salaries to officers and bookkeepers and no business transacted	1	0	0
c. Failure to fulfill terms of special grant	0	1	0
d. Failure to elect directors	0	2	0

der a statute which provided that "no . . . corporation . . . shall have . . . any corporate powers . . . until the said fee shall have been paid." The court held this constituted a condition precedent and did not allow the suit. In the opinion of the writer this statute decides the question. The statement that it shall not exercise any corporate powers includes the power to sue in the corporate name, and so is different from the statutes which merely state when the corporation comes into existence.

33. See for example, S. D. COMP. LAWS (1929) § 239; NEB. COMP. STAT. (1929) § 24-221.

34. WASH. REV. STAT. (Remington, 1932) § 3842.

Defect not stated. In a number of cases the court failed to consider or state the defect because the dealings were on a corporate basis or because the defendant was a former official of the association. That the courts are reluctant to allow a former official to set up defects in the association's organization is strikingly shown by the fact that in four of the nine cases involving suits against a former official, the courts thought it unnecessary to state the defect involved.[35] In the twelve cases in which dealings were on a corporate basis, and the defect was not stated, nine were suits on a note or draft,[36] one was a suit on a mortgage,[37] one on a contract,[38] and one to recover possession of a canal.[39] In the cases in which the defect was stated, comparatively few involved suits on notes. The conclusions to be drawn from these findings are (1) that if the suit is against an ex-official the chances are about even that the courts will refuse even to consider the defect, and (2) if the suit is on a note, and dealings were on a corporate basis, there is also a very good possibility that the court will refuse to consider the defect. With these exceptions the courts will usually consider the particular defect.

An attempt to incorporate resulting in "colorable" compliance. The cases on what constitutes "colorable" compliance show that defects in the certificate, such as failure to state purposes,[40] and failure to file the certificate with the county,[41] are no objections to the association suing in its corporate name. Similar results follow when the defect is failure to measure up to requirements for special classes of corporations, such as the amount of insurance contracts necessary for an insurance company;[42] failure of the state authorities to do an act, such as issuing a certificate of incorporation,[43] when the association has done all that is required; and failure to pay in the required amount of capital.[44]

The only controverted problem raised by the cases in this group arises when an insufficient number of shares has been subscribed for. The three cases in this group all involved dealings on a corporate basis. In one case the full capital had not been subscribed, and this was held not a valid de-

35. Seven Star Grange v. Ferguson, 98 Me. 176, 56 Atl. 648 (1903); American Forging & Socket Co. v. Wiley, 206 Mich. 664, 173 N. W. 515 (1919); Montoya v. Hubbell, 28 N. M. 250, 210 Pac. 227 (1922); Thompson Optical Institute v. Thompson, 119 Ore. 252, 237 Pac. 965 (1925).

36. See, for example, Butchers Bank v. McDonald, 130 Mass. 264 (1881); National Insurance Co. v. Bowman, 60 Mo. 252 (1875).

37. J. I. Case Threshing Machine Co. v. Copren Brothers, 45 Cal. App. 159, 187 Pac. 772 (1919).

38. Societe Titanor v. Paxton & Vierling Iron Works, 124 Neb. 570, 247 N. W. 356 (1933).

39. Imboden v. Etowah Mining Co., 70 Ga. 86 (1883).

40. Van Pelt v. Home Building & Loan Ass'n, 79 Ga. 439, 4 S. E. 501 (1887). Likewise where the failure is to include the list of original shareholders, Blanc v. Germania National Bank, 114 La. 739, 38 So. 537 (1905).

41. Grant Chrome Co. v. Marks, 92 Ore. 443, 181 Pac. 345 (1919); Schmitt v. Potter Title & Trust Co., 61 Pa. Super. 301 (1915).

42. Raegener v. Equitable Mutual Fire Ins. Co., 33 App. Div. 231, 53 N. Y. Supp. 484 (1st Dep't 1898). Likewise where a building and loan association fails to get the necessary number of members and stock subscriptions, Eagle Savings & Loan Ass'n v. Samuels, 43 App. Div. 386, 60 N. Y. Supp. 91 (2d Dep't 1899).

43. Receivers of the Bank of Circleville v. Renick, 15 Ohio 322 (1846).

44. Braintree Water Supply Co. v. Braintree, 146 Mass. 482, 16 N. E. 420 (1888); Wells Co. v. Gastonia Cotton Manufacturing Co., 198 U. S. 177 (1905).

fense.[45] A second case held that an agreement between officers and subscribers for the refunding of subscriptions, which in effect reduced the bona fide subscriptions below the required amount, was not a good defense.[46] In neither of these cases was the amount of the deficiency in subscriptions stated. But in *Eastern Products Corps. v. Tennessee Coal, Iron & R. R.*,[47] where only $800 had been subscribed to a corporation with a stated capital of $2,000,000, the court refused to allow the association to sue on a $475,000 contract. The great discrepancy between the apparent size of the association and the actual assets available made it unjust to allow it to enforce a contract, particularly when the contract could not have been enforced against it due to the lack of assets. This decision was in the face of a Tennessee statute providing that a corporation's organization could not be collaterally attacked. The court got around the statute by saying that no attack was being made on the organization of the corporation, but merely on the ability of the corporation to enter into a contract without any substantial assets. Although a dissenting opinion pointed out that this was really an attack on the organization, the result seems desirable. These decisions are not necessarily in conflict. It is quite logical that the amount of the deficiency in subscriptions should be the determining factor.

The failure to accept a special charter and the total failure to file a certificate of incorporation are two serious defects concerning which the cases give little information. There is only one case involving the failure to accept a charter.[48] In this case the defendant, who was the former president of the association, was regarded as estopped from setting up this defense. A different result might well have been reached if the suit had been against an individual who had not dealt with the association. There were two cases involving a failure to file the certificate of incorporation with the secretary of state, but neither clearly involved a failure to file with anyone at all. In one of these cases the certificate had been filed with the county.[49] In the other no statement was made as to whether there had been a filing elsewhere.[50] Suit was allowed in both cases.

Good Faith. The requirement of good faith where dealings are on a corporate basis practically disappears upon a study of the cases. In four cases there were false statements in the certificate, or in the application to the state for a certificate. The false statements were in regard to the amount of capital paid in,[51] the purposes of the corporation [52] and whether the qualifying shares of the directors had been paid for in cash.[53] All of these alleged defects involved fraud and not accidental mistake, and in all of them the association was allowed to sue. In the one case involving a different type of fraud, which was an agreement by the officers to refund subscriptions in order to get sufficient subscriptions to make up the required

45. Braintree Water Supply Co. v. Braintree, 146 Mass. 482, 16 N. E. 420 (1888).
46. Minor v. Mechanics' Bank, 1 Pet. 46 (U. S. 1828).
47. 151 Tenn. 239, 269 S. W. 4 (1924), *cert. denied*, 269 U. S. 572 (1925).
48. Close v. Glenwood Cemetery, 107 U. S. 466 (1882).
49. Leonardsville Bank v. Willard, 25 N. Y. 574 (1862).
50. Franklin County Building & Loan Ass'n v. Blood, 255 Ill. App. 175 (1929).
51. Southern Bank of Georgia v. Williams, 25 Ga. 534 (1858).
52. La Salle v. Hamilton National Bank, 204 Ill. App. 518 (1917); Lincoln Building & Saving Ass'n v. Graham, 7 Neb. 173 (1878).
53. Lindenberger Cold Storage & Canning Co. v. Lindenberger, 235 Fed. 542 (W. D. Wash. 1916).

amount of stock, the association was also allowed to sue.[54] Thus there is practically no requirement of good faith in cases where dealings are on a corporate basis, and no authority as to where they are not on a corporate basis. It would seem that the same result would follow if a case of the latter sort arose. There is a *dictum* by the Supreme Court of the United States to the effect that the good faith of the incorporators is unimportant.[55]

No valid statute authorizing such a corporation. There are three cases in which there was no statute authorizing such a corporation. In two of these the dealings were not on a corporate basis and the judgment is for the defendant.[56] The judgment is also for the defendant in the third case, but it does not appear whether dealings were on a corporate basis.[57] There are four cases in which the alleged purpose of the association was illegal. These cases are classified separately from those in which there is merely no statute authorizing such a corporation, because the defect would seem to be more serious where the purpose is actually illegal. These four cases all involve dealings on a corporate basis. In three, the alleged purpose is to buy or to hold real estate. One refuses recovery,[58] while the other two allow the suit,[59] with no distinguishing facts apparent.[60] In the fourth case the alleged purpose is usury, and the suit is allowed.[61] The cases in which there is a statute authorizing such a corporation, but the statute is unconstitutional, are classified separately. They involve no moral failure or negligence, and the defect would seem to be less serious. There are two cases in which dealings were not on a corporate basis and in both the suit is not allowed.[62] There are five cases in which the dealings were on a corporate basis and in all of them the suit is allowed.[63] Summarizing, it seems that the most important matter in this particular group is whether or not the dealings were on a corporate basis. In all four of the cases in which dealings were not on a corporate basis, the courts refuse to allow suit. In eight of the nine cases in which dealings were on a corporate basis, the suit is allowed.

User. There are two cases in which there was practically no user. In one case a special franchise was granted by the city. A month later the city revoked the franchise. The association then attempted to sue the city, although no shares had been subscribed or anything else done under the

54. Minor v. Mechanics' Bank, 1 Pet. 46 (U. S. 1828).

55. See Wells Co. v. Gastonia Cotton Co., 198 U. S. 177, 185 (1905).

56. American Loan & Trust Co. v. Minnesota & N. W. R. R., 157 Ill. 641 (1895); Evenson v. Ellingson, 67 Wis. 634, 31 N. W. 342 (1887).

57. New Orleans Gas-Light Co. v. Louisiana Light Co., 11 Fed. 277 (E. D. La. 1882).

58. Imperial Building Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 N. E. 167 (1909).

59. La Salle v. Hamilton National Bank, 204 Ill. App. 518 (1917); Mann Commission Co. v. Ball, 48 S. W. (2d) 780 (Tex. Civ. App. 1932).

60. The only basis on which a distinction could be drawn is that the charter specifically stated that the purpose of the corporation was to hold real estate, in the case in which the corporation was not allowed to sue. In the other cases it was merely alleged that the real purpose of the association was to hold real estate. This does not appear to be a sound distinction.

61. Lincoln Building & Saving Ass'n v. Graham, 7 Neb. 173 (1878).

62. Doboy & Union Island Telegraph Co. v. De Magathias, 25 Fed. 697 (C. C. S. D. Ga. 1885); Clark v. American Cannel Coal Co., 165 Ind. 213, 73 N. E. 1083 (1905).

63. See, *e. g.*, Coxe v. State, 144 N. Y. 396, 39 N. E. 400 (1895); Black River Improvement Co. v. Holway, 85 Wis. 344, 55 N. W. 418 (1893).

franchise. The court refused to allow the suit.[64] In the other case the suit was against a director for failing to proceed with the incorporation. The certificate had been filed with the secretary of state, but no meetings of shareholders or directors were ever held and no officers elected.[65] The court denied suit, but this case should not be cited as laying down a rule for all suits against officers under similar defects. The courts might well allow suit where, for example, the officer had appropriated the association's property. As to user generally, very little in the way of business transactions is necessary if the corporation is otherwise properly formed. In one case the only business in nine months had been to start three patent suits, and no salaries had been paid the officers, but this was held sufficient user.[66]

Ability to Sue the Association in Its Corporate Name

The ability of a third person to sue the association in its corporate name is, like the ability of an association to sue in its corporate name, primarily a procedural problem. But there is a difference in that if a suit is not allowed against the corporation, the costs and the delay go against the innocent party, and the association to this extent profits by its own defects. Because of this there seems to be very little, if any, reason why an association should not be subject to suit in its association name, at least if the execution of the judgment is limited to the association property. Determining that an association may be sued in its corporate name does not mean that the members of the association could not have been sued as if partners. The real question is not whether the association is a corporation or a partnership, but whether there is any reason why the courts should not allow a suit against the association in its corporate name. As will be seen from the following chart, there are noticeably fewer cases in this group than there are when the association is the plaintiff.

	Dealings not on a corporate basis	Dealings on a corporate basis
1. Attempt to incorporate resulting in "colorable" compliance		
a. Failure to file certificate anywhere	0	1
b. No acceptance of charter	0	1
c. No articles of incorporation	0	1 cannot be sued
d. Defects in the certificate itself	0	3
e. Defects in the execution of the certificate	0	1
f. Failure to file certificate with county	0	1
g. Failure to file other papers with county	0	1
h. No stock issued	1	2
2. Good faith (no cases)		
3. No valid statute authorizing such a corporation		
a. No statute to cover stated purpose	1	0
b. Statute unconstitutional	0	2
4. User		
a. No user as a corporation	1	0

As is to be expected, these cases show a more liberal tendency to allow suit than where the association is bringing suit. Two cases in which suits against labor unions were allowed may be noted here for purposes of comparison. If an association which never made any effort to become a

64. Aspen Water & Light Co. v. City of Aspen, 5 Colo. App. 12, 37 Pac. 728 (1894).
65. Martin v. Deetz, 102 Cal. 55, 36 Pac. 368 (1894).
66. Kardo Co. v. Adams, 231 Fed. 950 (C. C. A. 6th, 1916).

corporation may nevertheless be sued as though it were a corporation, why should not all defectively formed corporations, at least those of great size, be subject to suit in their corporate names?[67] In *United Mine Workers of America v. Coronado Coal Co.*,[68] the union was admittedly not a corporation. The other case involved a suit on an insurance policy and arose before the *Coronado* case. The court allowed the suit, saying that the name implied a corporation and that the officials bore corporate titles.[69]

There are two cases in which suit is allowed although the articles had not been filed anywhere.[70] One of these cases is not classified because it does not appear whether dealings were or were not on a corporate basis. There is a third case in which no certificate had been filed at the time of the accident, although the certificate was subsequently filed.[71] In allowing the suit, the court said that the defendant was a "de facto" corporation at the time of the accident. The only case in which suit against the association is not allowed is an early case in which no articles of agreement or certificate of incorporation had been drawn up.[72] It is not necessary that any shares be created, even if the dealings were not on a corporate basis.[73] The courts are also more liberal where the incorporation is under an unconstitutional statute, allowing recovery where the dealings were not on a corporate basis.[74] In the one case involving user, the association, after receiving its charter and electing officers, disregarded the officers and the members themselves carried on the business, acting as partners would, and the court allowed the suit.[75]

A corporation may, then, have any number of defects and still be liable to suit, if there was an incorporation agreement, and even this exception may not now be necessary as the only case in point was decided in 1858. There are comparatively few cases on this problem because in the great majority of cases where there are serious defects the plaintiff chooses to sue the members as partners.

Conclusion

The traditional approach to the problem of determining the legal attributes of defectively formed "corporations" appears inadequate and misleading. The same defect in organization may give an association some of the attributes of a corporation and some of the attributes of a partnership. Thus an association would be classed as a "de facto corporation" for some purposes and not for others, there being no "de facto" standard in vacuo. Also the traditional approach gives no consideration to the factor

67. The reason for allowing suits against labor unions in the association name is that their size makes naming all the members impractical. This factor is admittedly not present in many of the cases of defectively formed corporations, but the fact that the courts will abridge the common law in this field for the sake of convenience is of interest.

68. 259 U. S. 344 (1922).

69. Dugan v. Association of Iron Workers, 202 Ill. App. 308 (1916).

70. Merrick v. Reynolds Engine & Governor Co., 101 Mass. 381 (1869); Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385 (1869).

71. Frawley v. Tenafly Transportation Co., 95 N. J. L. 405, 113 Atl. 242 (1921).

72. Utley v. Union Tool Co., 77 Mass. 139 (1858).

73. McGinty v. Athol Reservoir Co., 155 Mass. 183, 29 N. E. 510 (1891); Ebeling v. Independent Rural Telephone Co., 187 Minn. 604, 246 N. W. 373 (1933).

74. Shadford v. Detroit, *etc.*, Ry., 130 Mich. 300, 89 N. W. 960 (1902).

75. Missing Link Coal Co. v. Postawa, 139 Okla. 75, 281 Pac. 223 (1929).

of dealings on a corporate basis, one of great importance in some problems, such as whether the members shall be liable as partners, although of comparatively little importance in the question of suits in the association name. The foregoing study of the cases may have clarified the questions as to one particular attribute, the ability to sue and be sued in the "corporate" name, and a somewhat similar approach seems advisable in dealing with other attributes.

The large number of statutes which are designed to prevent collateral attack on the incorporation procedure, indicates the general feeling against dismissing cases on procedural grounds rather than on the merits of the controversies. It has been seen that the courts have exhibited a similar tendency even in the absence of statutes, the later decisions taking a more liberal point of view, with a more frequent use of the word "estoppel", which is used only as a means to an end. The relatively small number of cases in which suit is not allowed leaves the courts a wide field in which to allow suits without trampling on precedent. The statutes which are designed to eliminate this problem are desirable, but since courts are not always given to literal interpretation of such statutes, it is still necessary to refer to case law in those jurisdictions, and the above tendencies may be evidenced even there.[76]

C. J. C., Jr.

Interstate Enforcement of Tax Judgments

The view that penal and revenue claims of a state, and judgments based thereon, need not be enforced by other states has been subject to a great deal of critical comment.[1] With the recent decision of the Supreme Court in *Milwaukee County v. M. E. White Co.*,[2] an important step has been taken toward removing these limitations upon the commands of the full faith and credit clause of the Federal Constitution.[3]

The holding in the case was that a judgment for income taxes, properly rendered in Wisconsin (the taxing state), must be given full faith and credit in a federal district court of Illinois. This in itself makes a considerable contribution, although a New Jersey court had previously reached a similar, though less far-reaching, result.[4] There had been sufficient despair of the

76. Eastern Products Corps. v. Tennessee Coal, Iron & R. R., 151 Tenn. 239, 269 S. W. 4 (1924); Note (1935) 29 ILL. L. REV. 655.

1. Leflar, *Extrastate Enforcement of Penal and Governmental Claims* (1932) 46 HARV. L. REV. 193; Hazlewood, *Full Faith and Credit Clause as Applied to Enforcement of Tax Judgments* (1934) 19 MARQ. L. REV. 10; Note (1929) 29 COL. L. REV. 782; Note (1933) 18 CORN. L. Q. 581; (1933) 42 YALE L. J. 1131. The general rule is discussed in all the standard texts. BEALE, CONFLICT OF LAWS (1935) 1408; GOODRICH, CONFLICT OF LAWS (1927) 12; DICEY, CONFLICT OF LAWS (5th ed. 1932) 212; WHARTON, CONFLICT OF LAWS (3d ed. 1905) 14, 18; MINOR, CONFLICT OF LAWS (1901) 21; STORY, CONFLICT OF LAWS (8th ed. 1883) 840.

2. 56 Sup. Ct. 229 (1935). Justices McReynolds and Butler dissented without opinions.

3. U. S. CONST. Art. IV, § 1.

4. New York v. Coe Mfg. Co., 112 N. J. L. 536, 172 Atl. 198 (1934), (1935) 83 U. OF PA. L. REV. 387, (1934) 48 HARV. L. REV. 137, (1934) 12 N. Y. U. L. Q. 137. The lower court opinion of this case, 10 N. J. Misc. 116, 162 Atl. 872 (Sup. Ct. 1932) is noted in (1933) 42 YALE L. J. 1131 and (1933) 18 CORN. L. Q. 581. The judgment in this case was for a fran-

likelihood of general adoption of such a view to cause the Restatement group to express the law as squarely contrary to the decision now announced.[5] But the implications of the opinion go further. The language used indicates that the Court may now require extraterritorial enforcement of revenue laws of the states (even though not reduced to judgment in the taxing state),[6] and also the extension of full faith and credit to judgments based on strictly penal claims of sister states.[7] If these questions are decided in the affirmative the law in this field will have been given a strong forward impetus.

The rules of non-enforcement which are now being threatened are really offshoots of the basic principle (which alone completely survived the *Milwaukee County* opinion) that the criminal law of a state will not be enforced by courts of other states.[8] The punishment of crime is thought to be a matter peculiarly concerning the intimate sovereign policy of a state, and aside from extradition and interstate rendition of criminals, other states generally will lend no aid. Whatever may be thought of the desirability of this attitude, the doctrine has become sufficiently imbedded in the law to preclude its abandonment by judicial decision. Similar reasons have been advanced for the non-enforcement of revenue claims of the states. For example, passing upon a tax claim of a sister state necessarily involves considering the validity of the tax itself and deciding whether enforcement of the claim would conflict with local public policy, and this is thought to lead to dangerous possibilities of ill will between the states.[9] It has been pointed out that it is more reasonable to suppose that ill will would result from the refusal to hear a sister state's tax claims at all,[10] but the policy against enforcement has found frequent judicial expression.[11] Other objections may be suggested, such as procedural difficulties and intricacies of foreign law into which courts

chise tax imposed on foreign corporations for the privilege of doing business within the state of New York. The Milwaukee County case, though also involving a particular type of tax (income), is decided with no reference to the nature of the tax, whereas the New Jersey court attached considerable importance to the fact that the tax in the Coe case was a fee for a granted privilege.

5. RESTATEMENT, CONFLICT OF LAWS (1934) § 443: "A valid foreign judgment for the payment of money which has been obtained in favor of a state, a state agency, or a private person, on a cause of action created by the law of the foreign state as a method of furthering its own governmental interests will not be enforced." Illus. 2 makes it clear that this refers to tax claims. In order to bring the section into line with the decision in New York v. Coe Mfg. Co., 112 N. J. L. 536, 172 Atl. 198 (1934), illus. 4 states that a state judgment against a foreign corporation for a fee for the privilege of doing business within the state must be given full faith and credit.

6. Instant case at 233.

7. *Id.* at 235.

8. RESTATEMENT, CONFLICT OF LAWS (1934) § 427. The rule was early announced by Chief Justice Marshall in the case of The Antelope, 10 Wheat. 66, 123 (U. S. 1825), and may be found discussed in the texts cited in note 1, *supra*, at the places indicated. For a discussion of the extent to which this rule is actually applied in giving extraterritorial effect to criminal convictions, see Note (1935) 84 U. OF PA. L. REV. 213. The test as to what constitutes a "penal" law is, in Huntington v. Attrill, 146 U. S. 657, 673-674 (1892), stated to be: ". . . whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act."

9. This rationale is best expressed in Judge Learned Hand's concurring opinion in Moore v. Mitchell, 30 F. (2d) 600, 604 (C. C. A. 2d, 1929).

10. Leflar, *op. cit. supra* note 1, at 217.

11. Moore v. Mitchell, 30 F. (2d) 600 (C. C. A. 2d, 1929), *aff'd on another ground*, 281 U. S. 18 (1930); see Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 290 (1888); Colorado v. Harbeck, 232 N. Y. 71, 85, 133 N. E. 357, 360 (1921); *cf.* Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 122 Minn. 266, 142 N. W. 305 (1913).

allegedly should not be compelled to inquire. These also have been rather effectively discredited,[12] but court decisions have given small hope of any co-operation between the states in enforcing tax claims unreduced to judgment.[13] The ease of transferring from the jurisdiction attachable property has made this rule an extremely disadvantageous one, and some states have resorted to reciprocal legislation in an attempt to tighten the net around tax evasion.[14] The following language by Justice Stone in the *Milwaukee County* case has, in this connection, an importance which is immediately apparent:

> "It has often been said, and in a few cases held, that statutes imposing taxes are not entitled to full faith and credit. . . . Whether one state must enforce the revenue laws of another remains an open question in this court. . . . But we do not stop to inquire whether the considerations which have been thought to preclude the enforcement of the penal laws of one state in the courts of another are applicable to taxing statutes; or whether the mere possibility of embarrassment in their enforcement should stay the hand of the court of another state in cases where in fact such embarrassment will not occur." [15]

Since the question at hand was the enforcement of a judgment based upon such a taxing statute, and not direct enforcement of the tax claim, no definite holding on the broader issue was made. But in view of the above language there seems to be a reasonably good chance that the further step will be taken when an appropriate case is presented.

In the anxiety of the courts to avoid embarrassments thought to be involved in inspecting the sovereign policies of other states, the fact that enforcing a judgment need entail no probing into the claims on which the judgment is based, has been somewhat obscured. The opinion by Justice Stone in the *Milwaukee County* case gives renewed emphasis to this factor. It is pointed out that recovery on a judgment can generally be prevented only by showing a lack of jurisdiction,[16] a payment or other discharge of the obligation,[17] or a lack in the forum of a proper type of court in which to enforce such a claim[18] Fraud in the procurement of the judgment is also recognized

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12. See Leflar, *op. cit. supra* note 1, at 217, 218.

13. See cases cited note 11, *supra*. In New York, a state to which a great deal of property is frequently removed, there has developed a consistent policy of non-enforcement of the revenue laws of sister states. In addition to the cases of Moore v. Mitchell (decided in the New York federal court) and Colorado v. Harbeck, both cited in note 11, *supra*, see Estate of Martin, 255 N. Y. 359, 174 N. E. 753 (1931); Matter of Anita Bliss, 121 Misc. 773, 202 N. Y. Supp. 185 (Surr. Ct. 1923).

14. At least fourteen states have enacted statutes for the reciprocal enforcement of state inheritance taxes. It is interesting to note that New York is included in this group. N. Y. Laws 1932, c. 333. For a full discussion of such legislation with citations to the statutes see the Prentice-Hall Inheritance and Transfer Tax Service (11th ed. 1935) vol. 1, tit. Reciprocity.

15. Instant case at 232-233.

16. Thompson v. Whitman, 18 Wall. 457 (U. S. 1874); Pennoyer v. Neff, 95 U. S. 714 (1877).

17. First Nat. Bank v. Hahn, 197 Mo. App. 593, 198 S. W. 489 (1917).

18. Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373 (1903).

as a possible basis for attack on the judgment.[19] Trial of such issues as these, it is said, "requires no scrutiny of its [the taxing state's] revenue laws or of relations established by those laws with its citizens, and calls for no pronouncement upon the policy of a sister state." [20] Further on appears an observation, re-enforcing the above arguments, which throws added light upon the attitude of the Court toward non-enforcement of tax claims of sister states in general: "In the circumstances here disclosed no state can be said to have a legitimate policy against payment of its neighbor's taxes, the obligation of which has been judicially established by courts to whose judgments in practically every other instance it must give full faith and credit." [21]

This seems to be a completely satisfactory refutation of the arguments against enforcement. Yet in reaching this conclusion the Court was compelled to disown an embarrassing passage from its decision in *Wisconsin v. Pelican Ins. Co.*[22] There the Court had said: "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment and the judgment as implying a promise by the defendant to pay it, do not preclude a court . . . from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." [23] Justice Stone replies that in several cases the Court has required that credit be given to the judgment of another state although the claim on which the judgment was founded would not have been directly enforceable in the forum.[24] To the extent that the *Pelican* case says that full faith and credit need not be given to a judgment unless the claim on which it is based is also entitled to full faith and credit, it is expressly repudiated.

In another respect the opinion indicates that pre-existing notions as to the current law may have to be revised. Judgments based on penal claims have generally been thought unenforceable extraterritorially,[25] just as the penal laws themselves will not be carried out in other states. The Restatement puts this as the present rule.[26] The language of the Court stressing the fact that the tax claim had been reduced to judgment would suggest that a similar approach may be taken in a case involving a judgment on a penal law,

19. See Christmas v. Russell, 5 Wall. 290, 304 (U. S. 1866) for an indication that fraud in the procurement of the judgment cannot be shown when the judgment is sued upon in another state. In Cole v. Cunningham, 133 U. S. 107 (1890) the Court said at 112 that the full faith and credit clause did not preclude an inquiry into whether the judgment was impeachable for a "manifest fraud."

20. Instant case at 233.

21. *Id.* at 234.

22. 127 U. S. 265 (1888).

23. *Id.* at 292, 293.

24. In Roche v. McDonald, 275 U. S. 449 (1928) it was held that full faith and credit must be given to a foreign judgment despite the fact that the judgment was based on a claim which arose in the state of the forum, the original claim having been barred by the statute of limitations in the state of the forum at the time the judgment was rendered. In Fauntleroy v. Lum, 210 U. S. 230 (1908) the foreign judgment was based on a gambling contract which by the law of the forum (where it was made) was illegal. It was held that full faith and credit must be given the judgment. Kenney v. Supreme Lodge, 252 U. S. 411 (1920) involves the same general principle.

25. GOODRICH, CONFLICT OF LAWS (1927) § 204; see Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 290 (1888); Huntington v. Attrill, 146 U. S. 657, 666 (1892). It has, however, been held in some state courts that a judgment based upon a penal claim is entitled to full faith and credit. Schuler v. Schuler, 209 Ill. 522, 71 N. E. 16 (1904); Healy v. Root, 28 Mass. 389 (1831). *Contra:* Arkansas v. Bowen, 3 App. D. C. 537 (1894).

26. RESTATEMENT, CONFLICT OF LAWS (1934) § 443.

and the Court furthers this belief by stating expressly that the result in the latter situation is an open question.[27]

The practical consequences of the decision may turn out to be extremely important. If tax claims are to be enforced extraterritorially even though not reduced to judgment, a vexatious obstacle to tax enforcement will have been unexpectedly removed, and the statutes providing for reciprocal collection of taxes will become unnecessary. Even if future decisions of the Court do not go that far, collection will be facilitated in that extraterritorial enforcement may be assured by first reducing the claim to judgment.[28] In any event, the *Milwaukee County* case has given new stature to the full faith and credit clause.

L. M. G.

27. "We intimate no opinion whether . . . full faith and credit must be given to such a judgment even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed." Instant case at 235.

28. There may be difficulty in securing such a judgment if the person owing the tax has fled from the jurisdiction and removed all his property. Even though the tax debtor has not taken such desperate measures, the process of securing a judgment constitutes a bothersome delay. See Note (1935) 45 YALE L. J. 339, 350.